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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 246

CHARLES CORYELL, *et al.*,
Petitioners,

against

JOHN S. PHIPPS AND GEORGE J. PILKINGTON,
Respondents.

BRIEF FOR RESPONDENT PHIPPS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioners seek to review a decision of the Fifth Circuit Court of Appeals affirming a final decree of the District Court for Southern Florida dismissing petitioners' libel against both respondents. They sued to recover for damage to their vessels on June 24, 1935 at respondent Pilkington's boat storage shed near Fort Lauderdale, Florida, which was destroyed by fire. The fire began on the charter boat *Seminole* owned and operated by Seminole Boat Company, a Delaware Corporation, of which respondent Phipps owned one-half the stock.

Pleadings

The libel, Art. Third (R. 8), alleges that the *Seminole* was owned by Seminole Boat Corporation but predicates Phipps liability upon allegations that he "operated or controlled" the *Seminole* and that his servants were negligent. Not until after issue had been joined did it appear, in an affidavit of counsel, that it would be claimed that Seminole Boat Company was "a dummy corporation" (R. 62, 69). Thereafter, by leave of court, Phipps amended his answer to plead limitation of liability pursuant to R.S. §§ 4283 and 4284 (R. 56-61).

The Trial

The trial consumed upwards of thirty court days. Forty-five witnesses were called and thirty-six of these testified in the presence of the Court. Printed briefs aggregating more than 800 pages were submitted and the Court heard argument for four days.

The Facts

Prior to February 1915 the *Seminole* was owned by H. C. Phipps, a brother of respondent Phipps. In that month respondent Phipps bought from his brother a one-half interest in the boat (R. 1882-3, Exh. 4-P). In 1922 her steam power plant was removed and gasoline engines and their necessary appurtenances substituted. In 1927-1928 she was largely re-built, her gasoline tanks were removed, opened, examined, cleaned, re-riveted, tested and

re-placed, her electric wiring was placed in conduit, etc. (R. 349-51, 1894-5, 1906-7, 2061-73).

The Seminole Boat Company was incorporated in Delaware in October, 1928, at the instance of the brothers Phipps. Shortly thereafter each brother sold his one-half interest in the *Seminole* to the corporation for one-half the corporate stock. The purpose of incorporating was to put the *Seminole* in the charter business for hire. The corporation promptly made a contract with an experienced charter boat master to operate the *Seminole* on charter for hire and in 1929 and 1930 she was chartered on several occasions. Thereafter she was always available in the charter market but due to the stock market crash in 1929 she proved too expensive in the depression years, and no charterer was found for her after 1930 (R. 1270-1, 1280, 1363-5, 1470-2, 1883-6, 1893-4, 1900-10, 1943, 1982, 1985-6; Exhs. V, W-1, W-2, CC, 4-P to 4-V incl., minutes of Seminole Boat Company for January 28, 1929 in Exh. U).

From incorporation to and including the time of the fire Paul Scott, R. C. Alley and Roy H. Hawkins were the directors and, respectively, President, Vice-President and Secretary-Treasurer of the corporation and were in full, complete and active charge of the management of the vessel. Because of the inability to obtain charters, Scott, the President, determined in 1931 to lay her up at Pilkington's basin (R. 1277-8, 1351-2, 1363, 1370, 1471-3, 1479-81, 1503-5, Exh. U).

In February, 1935, Hawkins, Secretary-Treasurer, upon his own initiative, decided to remove the *Seminole* from storage at Pilkington's, bring her to Miami, put her in commission, and offer her for charter or for sale. She was placed at the Royal Palm Dock where a "For Charter"

sign was placed upon her and she was listed with the brokers. Hawkins had her surveyed by an experienced ship surveyor who found her in good condition in all respects. No charterer was found and an offer to buy her was deemed inadequate and was rejected. Thereafter H. C. Phipps, owner of one-half the corporate stock, sold his stock to Mrs. Amy Guest. From that time on the stock was owned one-half by Mrs. Guest and one-half by respondent Phipps. No change in the management of the vessel ensued. She was managed exclusively by the corporate officers (R. 1273-4, 1282-1301, 1381, 1886, 2211-19, Exhs. F, V, W-3 and Journal Voucher 95 in Exh. Z).

In April, 1935, after the charter season was over and no charterer had been found, the stockholders, members of their families and friends went on a ten-day fishing trip in the *Seminole*. The crew was procured by the corporation's officers. The operating expense of the cruise was assumed by respondent Phipps but the expense of maintaining the vessel, as at all other times, was borne by the corporation. During the cruise the vessel operated perfectly and with no sign of any defect. The party left the *Seminole* at Lower Matecumbe. From there the master, upon orders from the Secretary-Treasurer of the corporation, returned the *Seminole* to Pilkington's where, on April 15, 1935, she was delivered to Pilkington for dead storage, having been prepared therefor by her crew. All her gasoline valves were left shut tight and the gasoline supply gauge showed empty. Her bilges were clean and free of gasoline and gasoline vapor. She remained in Pilkington's possession from April 15 to and including the day of the fire. Pilkington, as he admitted, went "on the boat, all through it, on Wednesday [five days] before

the fire and I didn't smell nothing and everything was in good shape" (R. 416, 462, 1301-4, 1513-14, 1746-9, 1754-9, 1764-70, 1887-9, 1914-16, 1970-8, 1983-4).

On June 24, 1935 Seminole Boat Company through Riley, who was authorized by the corporate officers to act for the corporation, employed R. C. Abel to proceed to the *Seminole* and inspect her. Abel drove his own car and bought gasoline for the trip, writing on the charge ticket the words "Seminole Boat Co.", thus indicating who his employer was. He presented to Pilkington written authority from Seminole Boat Company, by Riley, to board the *Seminole* and Pilkington gave him the keys. In the course of his inspection of the engine room an explosion occurred followed by the disastrous fire. His companion, John Thomas, who accompanied Abel to inspect a rope net, survived and testified that there was no odor of gasoline or vapor in the engine room (R. 251, 260, 299, 525, 1519-20, 1536-42, 1593, 1641-2, Exh. S reproduced at p. 27 of Vol. 6 of the record).

The District Court Decision

With relation to the ownership history of the *Seminole*, her sale to the corporation and her operation by the corporation the District Court found the facts substantially as above. Specifically the Court found:

"4. From the beginning and down to and including the time of the fire the directors and officers of the corporation were Paul Scott, R. C. Alley and Roy H. Hawkins, who were, respectively, President, Vice-President and Secretary-Treasurer. These men, as officers of the corporation, assisted by James F. Riley, and advised by Captain Baker and other boat captains, operated, controlled, maintained,

and managed the vessel from the time of her purchase by the corporation down to and including the time of the fire." (R. 3583)

"12. The Seminole Boat Company was incorporated in good faith for the bona fide purpose of taking title to the *Seminole*, and operating her in the charter business, and long prior to June 24, 1935. While it made no profits and no charters after 1930, it continued in existence as a bona fide corporation, and there is no fraud or other reason to disregard the corporate entity, pierce the corporate veil, or regard it as an agent of either of its stockholders. It stands as a non-conductor between the libellants and Pilkington on the one hand, and the stockholders on the other." (R. 3586)

Among other things the Court concluded:

"2. Seminole Boat Company, a Delaware corporation, was at all pertinent times a bona fide corporation, a valid creature of the law, not to be regarded as sham or fiction, or Phipps' agent, but as a legal non-conductor between Phipps on the one hand and libellants and Pilkington on the other, because there was no fraud or other improper conduct or purpose in the creation or continued existence of the corporation." (R. 3589)

"3. The *Seminole* was owned, operated, controlled and maintained by Seminole Boat Company, not respondent Phipps, and respondent Phipps is not liable for any acts or omissions of the Seminole Boat Company, or any persons who acted on its behalf." (R. 3589)

The Court made no findings as to the cause of the fire, i.e. whether or not the spark occurred through negligence or how the gasoline vapor that exploded (if it was gasoline vapor) got into the engine room. However, with its findings and conclusions the Court, under the heading "Discussion," indicated a view as to these points. The Court found that after the fire the gasoline valves were open (R. 3586) but failed to determine who opened them, or to explain how an inference that the tanks leaked could be

justified (there was no direct evidence of leaks) when the valves were open.

This "Discussion" amounts to an opinion merely and does not meet the requirements of Admiralty Rule 46½ that the Court "shall find the facts specially" and does not, therefore, represent facts determined in this case. *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55; *Fleischmann Construction Company* v. *United States*, 270 U. S. 349; *Harvey Co.* v. *Malley*, 288 U. S. 415. In brief, to hold respondent Phipps, libellants had to establish (1) that the fire was negligently caused and, (2) that the entity of the corporation owning the *Seminole* should be disregarded. A determination on either of these points favorable to Phipps must result in a dismissal as to him. The Court made formal findings on the corporate entity point only. The case in the District Court, therefor, was determined solely on the corporate point without any determination of the negligence issues.

As to the defense of limitation of liability the Court found that Phipps left the *Seminole* at Lower Matecumbe, that the *Seminole* was sent thence to Pilkington's upon the instructions of Hawkins, Secretary-Treasurer of the corporation, that she was prepared for lay-up at Pilkington's by her crew upon Hawkins' instructions and that Phipps "was not present and took no part in such preparation" (R. 3584-5). The Court concluded that

"4. Respondent Phipps was without privity or knowledge of the events that led up to and brought about the explosion and fire, and if corporate liability be disregarded, which in my opinion should not be, Phipps would be entitled to limit his liability to the value of his interest in the wreck of the *Seminole* after the fire under the Limitation of Liability statutes." (R. 3589)

The Circuit Court Decision

The Circuit Court of Appeals held that "the basic dispute turns upon the ultimate facts" and that "the evidence preponderates in favor of the findings made in each material instance" (R. 3648). In its opinion the Court pointed out that the *Seminole* was in Pilkington's possession when the fire occurred (R. 3645), set forth the ownership history of the *Seminole* substantially as stated above (R. 3646), and as to her operation and condition when and while stored with Pilkington, said:

"It is undisputed that the vessel had been examined and pronounced fit by an experienced ship surveyor in February, 1935; that she developed no flaws during the cruise or prior to reaching Pilkington's; that the crew left her gasoline valves closed, her electric switches open, her gas tanks registering empty, and her bilges clean and free of gasoline or gasoline vapor; and that she was repeatedly examined by competent men between April 15 and June 24, 1935, who discovered nothing wrong with her." (R. 3647)

The Court further found that the *Seminole* was at all times managed and operated by the officers of her corporate owner and that there existed no reason for disregarding the corporate entity saying:

"At all times after the title to the *Seminole* was transferred to the corporation her movements were directed by the officers of the corporation, she was manned by a crew employed by those officers, and all business dealings in connection with her operation and management were conducted by those officers." (R. 3647)

"Under the evidence, the case presents itself in this aspect: Appellants' vessels sustained damages by reason of the negligence of the Seminole Boat Company. In order

to hold Phipps to personal liability, appellants had the burden of establishing, by a preponderance of the evidence, that the corporation was an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunity that it carries, and that its activities in reality were those of Phipps personally. This burden was not discharged." (R. 3648)

The Court further held that even if the corporate veil should be pierced the libel must nevertheless be dismissed because Phipps did not have privity or knowledge of the cause of the fire and would, therefore, be entitled to limitation of liability under R. S. § 4283 saying:

"The evidence affirmatively establishes that no actual privity to or knowledge of the defective condition obtaining upon the *Seminole* was attributable to Phipps personally, and that none could be imputed to him since he had exercised due care and diligence in selecting competent men to man the vessel, and had imposed upon them full duties as to inspection and maintenance of her." (R. 3649)

Questions Presented

Petitioners pose several questions said to be presented (pp. 17-18). None of them is in fact presented. The questions stated by petitioners relate to "the individual owner of a yacht", "an owner of a vessel" and "an owner". On the contrary petitioners alleged in their libel that the *Seminole* was "owned by, and registered in the name of the Seminole Boat Corporation" (R. 8). The corporation is not a party to this suit. There was no issue as to ownership and both Courts found that the corporation was the owner and that respondent was merely owner of half its stock.

The real questions presented are:

1. Did respondent in fact so dominate the corporate owner of the *Seminole* that the corporate entity had been abandoned and should be disregarded? This presents only a question of fact which both Courts below found favorably to respondent.

2. If the corporate entity were disregarded and if Phipps were therefore regarded as one of two co-owners, did he have privity or knowledge of the cause of petitioners' losses such as to deny him the right to limitation of liability? This question was never reached by either Court below because each refused to disregard the corporate entity. However, each expressed the same opinion on the issue, i. e., that respondent did not in fact have knowledge or privity of the cause of petitioners' losses and would be entitled to limitation of liability if he were liable.

POINTS

I. No question of law is presented.

The Circuit Court of Appeals was right in saying that "the basic dispute turns upon the ultimate facts" (R. 3648). Whether petitioners contend that the corporation was a sham, or was dominated by Phipps, or was Phipps' agent, the ultimate questions are of fact, viz. whether corporate protocol was observed, whether the purpose of incorporation was legitimate, whether the directors and officers were independent of the stockholders, whether the

stockholders interfered with corporate activities out of character as stockholders, and whether the corporate officers and agents were upon corporate business, or upon stockholders' business as individuals, when acting in respect of the *Seminole* in any matter that related to the fire and petitioners' damage. Plainly these are questions of fact. The Courts below concurrently found these facts against petitioners.

There need be no fear that as a result of the decision below "yacht and other boat owners will be encouraged to utilize the fiction of corporate ownership without actual corporate independence as a means of escaping liability" (Petition, p. 2). Both courts below found that the corporation was the actual owner, was incorporated in good faith and that its officers acted for it, not the stockholders, and were independent of the stockholders (R. 3583, 3587, 3589, 3647, 3648).

Many issues of fact are raised by the petition (pp. 3-6). While Scott, Alley and Hawkins were "family representatives" in other matters they had never been endowed with any authority from Phipps to act for him in respect of the *Seminole*. The fact that they were Phipps' representatives in other matters is immaterial (R. 1351-2, 1362-3, 1452-7, 1471-3, 1479-84, 1503-5, 1943-5). The District Court rightly found as a fact that these men operated the *Seminole* "as officers of the corporation" (R. 3583).

It is said (Petition, pp. 3-4) that the directors and officers had no stock interest in the corporation and received no compensation. No authority is cited to suggest that these considerations are controlling. This Court has held that the question, Who is the servant's master?, must be

determined by the answer to the question, Whose work was the servant doing?, and that compensation is collateral. *Denton* v. *Yazoo & Mississippi Valley Railroad Co.*, 284 U. S. 305. There Hunter, paid by the Illinois Central Railway, was held to be in the employ of the United States from which he received no pay.

Petitioners assert (p. 4) that the corporation was not furnished with sufficient capital funds. Even if that were true their loss arises from no such deficiency. The corporation was sufficiently financed to meet normal strains. The financial backers of an enterprize where a single vessel is put in the charter business cannot fairly be required to finance the corporation so largely that it can pay the tremendous loss resulting from this catastrophic fire upon pain of a disregard of the corporate entity. Any such requirement would emasculate one of the legitimate purposes of incorporation.

Petitioners complain (p. 4) about the manner in which the corporate books were kept. Its bills were paid by other corporations which extended it credit and which were duly repaid. The corporation kept its own books, showing a record of every expense, of every item of income, and of every re-payment of a debt (R. 1673-5, 1698-9, 1703, 1722-4). Because it operated at a loss after 1930 does not render it non-existent as a separate entity. Cardozo, J. said in *Petrogradsky M. K. Bank* v. *The National City Bank of New York*, 253 N. Y. 23:

> "Neither bankruptcy • • • nor cessation of business • • • nor dispersion of stockholders, nor the absence of directors • • • nor all combined, will avail without more to stifle the breath of juristic personality. The corporation abides as an ideal creation, impervious to the shocks of these temporal vicissitudes" (pp. 31-2).

There is no justification for petitioners' assertion (p. 4) that the officers acted pursuant to the stockholders' directions on all except minor routine matters. Of cource the stockholders were consulted concerning the proposed sale of the *Seminole*, the principal corporate asset, and the purchase of an additional vessel. The proposal to sell the *Seminole* was tantamount to a proposal that the corporation go out of business and the officers' consultation with the stockholders was natural and in character as stockholders. The proposal to buy another vessel was a proposal to double the size of the "fleet" and, to say the least, the officers were entitled to ascertain the wishes of the stockholders as to this. These consultations indicate no breakdown of the corporate entity (R. 1295-1301, 1333, 1381, 1389-90, 1463-4, 1886-8, 1914, 1942).

Petitioners assert (pp. 4-5) that the corporate officers could not incur more than nominal expense without express authority from the stockholders. There is no basis in fact for this assertion. On individual items Hawkins, Secretary-Treasurer, limited himself to $500., and Riley limited himself to $300., because the corporation was operating at a loss. No limitation was imposed by respondent. These limitations were *self-imposed* (R. 1334, 1380, 1505, 1912-14).

There is no support for petitioners' statement (p. 5) that respondent made personal use of the vessel whenever he desired. As petitioners say (p. 6) the *Seminole*, after April, 1930, "was continuously in storage up to the time of the fire except for only four brief occasions". The trip in March-April, 1932, was not for respondent but for both stockholders (R. 1507-8). Who used her on the August, 1932, trip was not proved (R. 1916-17). There is no proof

that the use in March-April, 1934, was for respondent. In 1935 the *Seminole* was not put in commission for respondent but by an officer of the corporation "upon his own initiative" to offer her for charter or for sale (R. 3584). The 1935 cruise was originally planned in another boat hired for the purpose but when all hope of chartering the *Seminole* in that season had vanished both stockholders, not respondent alone, used the vessel for ten days (R. 1282-3, 1373, 1824, 1887-8). These uses by both stockholders together do not tend to establish domination by respondent. Moreover they were not uses adverse to the corporate interest but favorable to it. It is obviously easier to charter a vessel, and better for her maintenance to have her in commission rather than laid up in dead storage. Furthermore, petitioners were in no way affected by these uses since the vessel was in dead storage and had been for upwards of two months when the fire and their damage occurred.

Respondent never owned more than one-half the corporate stock and for upwards of five years before the fire the corporation, not respondent, owned, operated and controlled the *Seminole*, as both courts found. Stockholders need not remain utterly aloof from the corporate business to maintain the separate entity. As stockholders they are entitled to evidence a legitimate interest and assert a legitimate control over the corporate affairs. Both Courts below found as fact that respondent did no more. In *Eichelberger* v. *Arlington Building, Inc.*, 280 Fed. 997, the Court said: "It is true the stockholders control it, but that surely does not render it invalid" (p. 1000).

II. There is no conflict of decisions as to the corporate entity.

Manifestly quotations from the decisions below cannot be understood except in the light of the facts and the issues determined. Petitioners cite no case reasonably analogous on the facts the decision of which is inconsistent with the decisions below.

Davis v. *Alexander*, 269 U. S. 114, was a case "where one railroad company actually controls another and operates both as a single system" (p. 117). In *Chicago, Milwaukee & St. Paul Rg. Co.* v. *Minneapolis Civic Assn.*, 247 U. S. 490, two railroad companies took over and operated a third as a "completely controlled agency" of certain terminal delivery tracks as an adjunct of *their own* businesses. *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, was a prosecution for violation of the Anti-Trust Act where the parent corporation had deliberately gained control of, and operated, the subsidiary for the purpose of doing indirectly what the Anti-Trust Act forbade it to do directly. Nothing decided, or said, below conflicts with these.

Lehigh Valley R. R. Co. v. *DuPont*, 128 Fed. 840 (C. C. A. 2), was a death action against a rail carrier. The passage ticket was issued by the defendant and the relationship of passenger and carrier existed between plaintiff and defendant. The carrier attempted to force liability on its subsidiary but could not escape *its own* contract.

Lehigh Valley R. R. Co. v. *Delachesa*, 145 Fed. 617 (C. C. A. 2), turned on the trial court's instructions to the jury, viz., that the parent company was not liable to the

plaintiff unless the jury found that the parent was *itself* engaged in delivering the iron at the dock during the course of which plaintiff sustained his injuries. The language of the opinion is soundly criticized by Douglas and Shanks in *Insulation from Liability Though Subsidiary Corporations*, Yale Law Journal, Vol. 39, pp. 206-7.

In *Costan* v. *Manila Electric Co.*, 24 F. (2d) 383 (C. C. A. 2), the parent, disregarding its subsidiary's existence, appointed *its own* manager of the subsidiary's property, authorizing him to "hire operating employees on its behalf, to fix their salaries, and to discharge them, and to purchase labor, materials and supplies, in its name and on its behalf" (p. 384). In these circumstances the Court found that the operating employees were in fact employees of the parent, not the subsidiary, and held the parent liable for the negligence of *its own* employees.

In *The Willem van Driel Sr.*, 252 Fed. 35 (C. C. A. 4), certiorari denied 248 U. S. 566, the railroad company acquired a 999-year lease of the property and franchises of the corporation owning the grain elevator which the court held "were constructed and operated merely as a facility to the business of the railroad company" (p. 39).

In *Luckenbach S. S. Co.* v. *W. R. Grace & Co. Inc.*, 267 Fed. 676 (C. C. A. 4), the parent wholly owned the subsidiary and operated the subsidiary's vessel as a unit of *its own* fleet. There was no question of a parent's liability for a subsidiary's tort.

In *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, this Court recently stated the proposition for which the two cases last cited, and others relied upon by petitioners, stand, viz.

"* * * it is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management" (p. 524).

We do not dispute this proposition and petitioners' authorities establish nothing more. It is not applicable here because the corporation was no department or subordinate part of any business of respondent.

In Re Great Lakes Transit Corp., 81 F. (2d) 441 (C. C. A. 6), involved no disregard of corporate entity. Playfair, not the corporation, was held to be in fact the owner of the vessel (p. 442).

In *The Silver Palm*, 94 F. (2d) 776 (C. C. A. 9), petitioner for limitation of liability alleged that it was "owner and operator" of the vessel. After liability had been imposed, however, it sought to establish that another corporation was the operator. One Thompson was manager both of petitioner and the corporation which the petitioner belatedly claimed was operator. The Court held only that his knowledge, whether gained as manager of one company or the other, constituted privity under the limitation statute. No corporate entity was disregarded.

Counsel for petitioners misunderstand the reference of the Courts below to fraud. Petitioners' contention as to domination was squarely presented below—see the excerpt from our main brief in the Circuit Court of Appeals printed *infra* as Appendix A. The Courts below did not refer to fraud in the sense of false dealing between two parties. They meant, and with reasonable clarity said, that Seminole Boat Company was honestly conceived and continued in

existence for proper purposes without domination by the stockholders out of character as such. The fraud the Courts found nonexistent was fraud upon the law, referring doubtless to Powell on *Parent and Subsidiary Corporations* where the author says:

"If stockholders' immunity is thus grounded in the basic law of corporations, the only justification for its judicial denial is that it should not be recognized in cases in which the legislature or common law never contemplated it should be granted. In other words, the immunity was created for certain legitimate purposes and it should not, therefore, be permitted for purposes that are not legitimate. The basis, therefore, for abrogating the normal immunity of stockholders is *an abuse of the privilege to do business in corporate form*, or in other words, *a fraud upon the law*" (p. 2).

III. There is no conflict of decisions as to limitation of liability.

Both Courts below held respondent not liable. Both expressed the opinion that *if* he were liable he could limit.

The fallacy in petitioners' claim of a conflict of decisions lies in their attempt to apply to an individual the corporate rule as to privity. The question cannot arise unless the corporate entity of the Seminole Boat Company be brushed aside and Phipps be regarded as one of two individual co-owners.

Richardson v. *Harmon*, 222 U. S. 96 involved a petition for limitation by three individual co-owners of a vessel. This Court said:

"In view of the manifest policy of Congress to further encourage the ship owning industry and the very broad terms employed in this last legislation, we can but infer

that the policy of the Government was to confine the risk of an owner *not personally at fault* to his interest in the ship" (p. 104, italics ours).

"Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for *his own* fault, neglect and contracts" (p. 106, italics ours).

Compare Benedict on Admiralty, 6th Edition (1940) Vol. 3, pages 384-5.

Both Courts below found that respondent was "not personally at fault", and that he had no knowledge of, and was not privy to, the cause of petitioners' losses.

The difference in the privity rule arose as a result of corporate ownership. Since a corporation has no physical being and of necessity acts through natural persons who are its agents, the knowledge of certain of those agents must be held to be the knowledge of the corporation. Otherwise a corporation would never have privity or knowledge and could always limit its liability. Numerous cases stemming from *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, hold that where the owner is a corporation its privity or knowledge is that of an officer or agent having managerial status. Petitioners sought (unsuccessfully) to brush the Seminole Boat Company aside, regard respondent as one of two co-owners, and yet apply the corporate privity rule, and impute to him the privity or knowledge (claimed but not proved) of the officers of Seminole Boat Company.

The Silver Palm, 94 F. (2d) 776 (C. C. A. 9) involved a corporate petitioner, not an individual. The Court merely held that a corporate vessel owner is charged with the

privity or knowledge of its agent having managerial capacity, whether that agent be an individual or another corporation. The person referred to in the italicized portion of the quotation from this decision at page 14 of the petition is the corporate agent of the vessel owner, not the vessel owner itself.

In re Great Lakes Transit Corporation, 81 F. (2nd) 441 (C. C. A. 6) involved petitions by a corporation and the individual who, as the Court found, was the owner. Limitation was denied to the individual because he had personally contracted to supply a seaworthy vessel, an obligation against which an owner cannot limit his liability in any event.* By way of dictum the Court added that the individual owner could not limit because of imputed knowledge but wholly overlooked the distinction between the corporate and the individual rule. The cases cited by the Court to support its opinion on this point are all corporate owner cases (p. 444).

In re New York Dock Company, 61 F. (2d) 777, (C. C. A. 2) involved an individual but the Court overlooked that fact and applied the corporate rule. No issue was raised as to which privity rule, corporate or individual, should apply and only cases involving corporate owners were cited by the Court to support its ruling (p. 779).

Wherever the point has been squarely raised the Courts have invariably held that privity or knowledge may not be imputed to an individual owner. *The Yungay*, 58 F. (2d) 352; *The Chehaw*, 54 F. (2d) 645; *Christopher* v. *Grueby*, 40 F. (2nd) 8; *Successors de Esmoris & Co.* v. *Whitney & Bodden Shipping Co. Inc.*, 39 F. (2nd) 191;

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* *Pendelton* v. *Benner Line*, 246 U. S. 353.

Petition of Liebler, 19 F. Supp. 829; *The City of Camden*, 292 Fed. 93 (C.C. A. 3); *James McWilliams Towing Line* v. *Shaw*, 288 Fed. 74; *Flynn* v. *Christenson*, 273 Fed. 385, (C. C. A. 9); *The Tommy*, 151 Fed. 570 (C. C. A. 2); *Quinlan* v. *Pew*, 56 Fed. 111 (C. C. A. 1); *In re Leonard*, 14 Fed. 53.

If petitioners' theory were sound it would destroy the limitation statutes so far as individual owners are concerned as fully as if Congress repealed them. The individual owner could never limit. If he operated the vessel personally he would necessarily always have knowledge. If he employed a person to operate her for him, no matter how competent such employee might be, the knowledge of that person would always be imputed to him.

IV. There is no conflict of decisions concerning the nature of the negligence involved.

Petitioners assert (pp. 15-17, 32-3) that the District Court allowed respondent to limit his liability because the character of the negligence involved was non-feasance rather than misfeasance and that such decision is in conflict with decisions elsewhere. There is no basis for this contention. The District Court in its "Discussion" said:

> "Furthermore, the character of the negligence which this record discloses is the failure to do or perform a duty, or nonfeasance. Such failure of duty does not give rise to an application of the alter ego or agency doctrine. I can well conceive of cases where a positive wrong, an act of positive negligence, may lead to individual liability of a stockholder in a corporately owned offending vessel, but this is not such a case" (R. 3587).

The Court was not discussing the limitation question. It was discussing petitioners' contention that respondent should be held for the corporation's alleged tort, a question of liability not of limitation. It is elementary that nonfeasance by a corporate officer (a stockholder is less than that—respondent was neither a director nor an officer) does not give rise to personal liability to third parties injured by the corporation's tort. Only misfeasance gives rise to such third party liability and such liability of the corporate officer is not for the corporation's tort but for his own.

Even if the record showed that there was a failure to inspect or that there was a failure to establish a regular system of inspection by competent inspectors, respondent would not be affected because he was not more than a stockholder in the corporation which owned and operated the vessel. He owed no duty to petitioners to inspect or set up any system of inspection. The cases cited by petitioners on this point have no relation to the problem presented by the facts here.

Petitioners (p. 16) challenge the finding of the Circuit Court of Appeals that

> "The evidence affirmatively establishes that no actual privity to or knowledge of the defective condition obtaining upon the *Seminole* was attributable to Phipps personally, and that none could be imputed to him since he had exercised due care and diligence in selecting competent men to man the vessel, and had imposed upon them full duties as to inspection and maintenance of her" (R. 3649).

There is no basis for petitioners' challenge. Pilkington, in whose possession the *Seminole* was, was obliged under the contract to inspect her and testified that he did so "almost every other day" (R. 319, 516-20, 746-7).

Baker, her master, was likewise charged with the duty of inspecting her and did so (R. 1968, 1983, 1987, 2023-4, 2044-7). A system of inspection by the master has been held to be enough. *California Yacht Club* v. *Johnson*, 65 F. (2d) 245 (C.C.A. 9).

In March, 1935, three months before the fire, the corporation employed an experienced marine surveyor to inspect the *Seminole* thoroughly. He made a "close internal examination of the hull and the parts", found no indication of anything wrong, reported that all Government requirements had been fully complied with, and that the vessel was in good seaworthy condition (R. 2211-18, 2230, 2246-9).

Whether or not the corporation's officers (Scott, Alley, Hawkins, Riley) were competent to inspect is immaterial. They managed the business of the vessel. For practical inspections they relied upon the master, the marine surveyor, and Pilkington, in whose possession she was.

It is anomalous indeed for petitioners to complain about inspections. An inspection was in progress at the time their loss occurred. Abel, an experienced boat captain, had been sent by the corporation to "inspect the *Seminole*" and was inspecting the engine room when the explosion occurred (R. 252-6; Finding 8, R. 3585).

V. The petition for certiorari should be denied.

Respectfully submitted,

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EUGENE UNDERWOOD,
Counsel for respondent Phipps.

Dated: New York
August 21, 1942.

APPENDIX A

Extract from Respondent's Brief in the Circuit Court of Appeals*

THE LAW AS APPLIED TO THE FACTS HERE.

It must be apparent that quotations from decisions cannot ordinarily be applied except in relation to facts fairly analogous to those that evoked the language used. The fraud cases have no application because the claims here do not arise out of any mutual dealings but out of an alleged tort in which no fraud is claimed. Nor do the cases concerned with the creation of corporations to evade the law have any bearing because there is no evidence that the Seminole Boat Company was formed for any other than proper corporate purposes. The only principle of law relied upon that could be relevant here is that illustrated by the domination cases. These, however, do not support our adversaries' conclusions. To avoid the corporate concept domination must be out of character as stockholder, *for the benefit of him who dominates, in his own affairs, as distinguished from the benefit of the corporation in its affairs;* the dominated corporation must be used as an agent *in the dominator's business and for his purposes*—a fraud upon the law. Accordingly we ask, In what personal business of his did Phipps use the Seminole Boat Company? The answer must be, None. He never used the corporation. The transfer of one's property to, and investment of money in, a corporation is not using the cor-

* Referred to *supra*, p. 17.

poration in one's business, yet that is the sum and substance of what Phipps did—and not alone, but with a co-stockholder, equally. His infrequent use of the boat, as charterer without hire but at his own expense, was neither using the corporation in his own business nor against the corporation's interests. The argument that Hawkins *et al.* were acting in Phipps's business when they acted in respect of the corporation begs the question and assumes the non-existence of the corporation. When they acted for the *Seminole* they acted for both stockholders equally, *as stockholders, i.e.*, for the corporation. No case cited holds that a corporation should be disregarded because its agents are the stockholders' agents in other affairs. The rule to be gleaned from the cases cited is that control, fixing liability on him who controls, must be exercised in some *personal* business *adverse to the corporate business*. The evidence in this case shows no such incident. Phipps's every act in respect of the *Seminole* after the corporation embarked in business, and they were few enough, was consistent with a stockholder's proper interest in the affairs of the corporation *for the benefit of the corporation*.

Libellants give little or no attention to what constitutes domination. Our position is that to warrant setting aside the corporate entity, domination and control must be so complete that the corporation has no mind, no will, no existence of its own. The cases cited in the opposing brief are not contradictory but support this statement of the law. We have reviewed the evidence bearing upon Phipps' alleged domination at pp. 101-133. It will support only the conclusion that his co-stockholder exercised an equal authority and that every exercise of authority was as stockholder for the corporation not adverse to it (pp. 162-4).